STATE OF MICHIGAN

IN THE SUPREME COURT

CHARLES C. STARKS, JR.,

Plaintiff/Appellant,

Vs.

Court of Appeals No. ~~256401~~ 257127 Gn 11/24/
Lower Court No. 01-5581-CZ
Supreme Court No. _____

Macomb
D. Miller

MICHIGAN WELDING SPECIALISTS, INC., ~~a Michigan corporation,~~ AUGUST F. PITONYAK, ~~an individual,~~

Defendant/Appellee,

130283 Ok

_____/

JOHN R. TATONE & ASSOCIATES, P.L.C.	**ROBERT S. HUTH, JR. (P42531)**
BY: JOHN R. TATONE (P55825)	**Attorney for Michigan Welding Specialists**
Attorneys for Plaintiffs	**and August F. Pitonyak**
33830 Harper Avenue	**19500 Hall Road, #100**
Clinton Township, MI 48035	**Clinton Township, MI 48038**
(586) 415-1200	**586-412-4900**

App 1/31

21573 _____/

NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

ORDERS APPEALED FROM

Trial Court's Opinion and Orders Dated July 2, 2003 and May 13, 2004
Court of Appeals Order affirming the Trial Court's Orders dismissing Plaintiff's Complaint dated November 29, 2005

AFFIDAVIT OF SERVICE

John R. Tatone (P55825)
John R. Tatone & Associates, P.L.C.
Attorney for the Plaintiff/Appellant
33830 Harper Ave
Clinton Twp., Michigan 48035

STATE OF MICHIGAN

IN THE SUPREME COURT

CHARLES C. STARKS, JR.,

Plaintiff/Appellant,

Vs.

Court of Appeals No. 256401
Lower Court No. 01-5581-CZ
Supreme Court No. _____

MICHIGAN WELDING SPECIALISTS, INC., a Michigan corporation, AUGUST F. PITONYAK, an individual,

Defendant/Appellee,

/

JOHN R. TATONE & ASSOCIATES, P.L.C.
BY: JOHN R. TATONE (P55825)
Attorneys for Plaintiffs
33830 Harper Avenue
Clinton Township, MI 48035
(586) 415-1200

ROBERT S. HUTH, JR. (P42531)
Attorney for Michigan Welding Specialists and August F. Pitonyak
19500 Hall Road, #100
Clinton Township, MI 48038
586-412-4900

/

APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statues

Court Rules

INDEX OF APPENDICES

STATEMENT REGARDING APPLICATION FOR LEAVE TO APPEAL, ORDER APPEALED FROM, JURISDICTION AND RELIEF SOUGHT

Plaintiff/Appellant, Charles C. Starks, Jr. by and through his attorneys, JOHN R. TATONE & ASSOCIATES, P.L.C., request that this Honorable Court grant his application for leave to appeal and pursuant thereto reverse the Court of Appeals Opinion dated November 29, 2005 affirming the Trial Courts Opinion and Order dated July 2, 2003 and for the reasons stated below.

This application for leave to appeal addresses the Trial Courts' Opinion and Order dated May 13, 2004. After a flurry of motions by the Defendant containing various titles, the Trial Court reversed itself dismissing the Plaintiffs Complaint as to all Counts and all Defendants. [1]

The Court of Appeals affirmed the Trial Court's Opinion and Order on November 29, 2005. **(Exhibit 39).** This Court has jurisdiction to review this timely application for leave pursuant to MCR 7.301 (A) (2) and MCR 7.302 (C) (2) (a).

Plaintiff/Appellant Charles C. Starks, Jr. requests this Court grant his application for leave to appeal and that this Court reverse the Trial Courts aforementioned Opinion and Orders.

[1] An Order staying proceedings was filed in the Trial Court by the Bankruptcy Court as to Defendant Deborah Ulry. The parties eventually entered into a stipulation and order dismissing Deborah Ulry from the present case. All debts in relation to Charles Starks owed by Deborah Ulry and Lawrence Ulry were discharged in Bankruptcy Court.

STATEMENT OF ISSUES PRESENTED

1. Did the Trial Court err in granting Defendant's Motion for Reconsideration of Defendant's Motion for Clarification?

   The Trial Court says: "No"

   The Appellant says: "Yes"

   The Appellee says: "No"

2. Did the Trial Court err in dismissing Plaintiff's claim for conversion?

   The Trial Court says: "No"

   The Appellant says: "Yes"

   The Appellee says: "No"

3. Did the Trial Court err in dismissing Plaintiff's claim for a constructive trust?

   The Trial Court says: "No"

   The Appellant says: "Yes"

   The Appellee says: "No"

4. Did the Trial Court err in not granting Plaintiff's Counter Motion for Partial Summary Disposition to successor liability of Michigan Welding Specialists?

   The Trial Court says: "No"

   The Appellant says: "Yes"

   The Appellees say: "No"

5. Did the Trial Court err in granting Defendant's Motion for Summary Disposition as to Plaintiff's fraudulent conveyance claim?

   The Trial Court says: "No"

   The Appellant says: "Yes"

   The Appellees say: "No"

6. Did the Trial Court err in dismissing claims against Pitonyak individually under a theory of piercing the corporate veil?

   The Trial Court says: "No"
   The Appellant says: "Yes"
   The Appellees say: "No"

STANDARD OF REVIEW

The Court of Appeals reviews de novo questions or law, including issues and statutory construction. Thomas v. New Baltimore 254 Mich App 196, 200; 657 NW 2d 530 (2002), citing Schroeder v. Detroit, 221 Mich App 364, 366; 561 NW 2d 497 (1997).

STATEMENT REGARDING GROUNDS TO APPEAL

MCR 7.302 presents, as grounds for appeal, inter alia; (1) the issue involves legal principals of major significances to this States jurisprudence, and (2) the decision is clearly erroneous and will cause material injustice where the decision conflicts with a decision from the Supreme Court or another decision of the Court of Appeals.

In this case, it is a matter of great significance whether the Trial Court has discretion as to hearings prescribed by time limit and dictated by the Michigan Court Rules. In particular, MCR 2.119 (f) (1), regardless of the titling of the motion for reconsideration by a party.

It is also imperative that this Court determine that it is improper for both the Trial Court and the Court of Appeals to substitute its fact finding for that of a jury.

Lastly, the decision of the Trial Court and Court of Appeals allows debtors to explodit a perceived "loop hole" in statutory construction of fraudulent conveyances as well as successor liability theories.

STATEMENT OF FACTS

During the 1970's and 1980's, Charles C. Starks, Jr. (hereinafter "Starks") was the sole owner of an entity known as Accurate Welding, Inc. (hereinafter "Accurate I") Interminently, Lawrence Ulry (hereinafter "Ulry") worked at Accurate Welding, Inc. through the late 70's and early 80's. In 1984, Ulry and Starks created an entity known as Accurate Welding II, Inc. (hereinafter "Accurate II"). The main focus of Accurate II was to be welding larger dyes and molds as opposed to Accurate I's focus on smaller dyes and molds. In particular, Accurate II was to do work for the big three auto makers. Ulry was elected as President of Accurate II providing his labor and expertise in this area as well as contacts with the big three auto makers. Starks was elected as Secretary and Treasurer of Accurate II and provided all start-up funding for the operation (approximately $80,000.00). Please note Ulry did not invest any sums for the initial start-up of Accurate II.

In 1994, Ulry and a key employee by the name of David DeCook (hereinafter "DeCook") sold to themselves the essential assets of Accurate II and formed a new company called Dualtech, Inc. (hereinafter "Dualtech"). This action was in an effort to oust Starks from receiving his portion of this very profitable business. During the year preceding the creation of Dualtech, Starks had received approximately $104,000.00. Dualtech has always been managed by Ulry and his wife, Deborah Ulry.

Immediately, claims and counter-claims were filed by the parties against each other in the Macomb County Circuit Court as case number 94-5455-CZ. The ten count amended counter-complaint essentially alleged fraud and breach of fiduciary duty by Ulry, as well as conspiracy by DeCook resulting in an arbitration award in favor of Starks against Dualtech and Ulry in the amount of $435,000.00 in September, 2000.

On or about October 30, 2000 the court entered a Judgment for $435,000.00 against Dualtech, Inc. and Lawrence Ulry. Shortly thereafter, several garnishment forms were issued to various banks utilized by Dualtech and Ulry. As a result of negotiation and the outstanding garnishments, the parties entered into a written settlement agreement which included a provision for Starks to have a secured interest and UCC-1 lien on all of the assets of Dualtech. **(See Exhibit 1 and 2)** Pursuant to that agreement, Dualtech paid to Starks the sum of $100,000.00 in January, 2001. Each month thereafter, Dualtech was to pay to Starks $4,000.00. A balloon payment would be due in January, 2004 for the balance. This would allow Dualtech to stay in business.

The last payment of $4,000.00 was received by Starks was in May, 2001.

Ulry and an individual named August F. Pitonyak (hereinafter "Pitonyak") who is an old friend of Ulry and former business partner with Ulry in a bar, entered into a business arrangement with Pitonyak **(See Exhibit 3)**

In December 2004 the building occupied solely by Dualtech was owned by L&D Renaissance Properties, L.L.C., (hereinafter "L & D"). L & D's sole members were Ulry and DeCook. Ulry and Pitonyak become business partners in the building when Pitonyak purchased a 50% interest in L&D for the sum of $150,000.00. **(Exhibit 3)** Supposedly, $50,000.00 went to DeCook for his interest in the building, (or L&D) and DeCook's interest in Dualtech was given to Ulry by DeCook in exchange for a release from all bank debt. $100,000.00 went to Starks as the first settlement payment. Pitonyak then signed documentation with National City Bank to be Guarantor of the L&D loan to National City which was in the amount of approximately $414,000.00 to allow the bank to release DeCook from any liability. **(See Exhibit 4)** This transaction was unknown to Starks and his counsel during settlement negotiations and same were led to believe that DeCook and Ulry were going to continue to run Dualtech and L & D.

Ulry claims he also borrowed $150,000.00 in December from Pitonyak personally securing same with Ulry's 50% interest in L&D as well as a rental property owned by Ulry and Deborah Ulry, located at 72 Rathbone, Mt. Clemens, Michigan.**(Exhibit 5)** The tenant at 72 Rathbone is Ulry's step-mother. The $150,000.00 originated from Pitonyak's home equity line of credit. **(Exhibit 6)** Quarterly interest payments were to be made by Ulry to Pitonyak for the $150,000.00 personal loan. Thus, the first payment was due March 1, 2001. Pitonyak stated that he knew of Starks' judgment against Ulry and Dualtech for $435,000.00 at the time Pitonyak loaned Ulry the money. **(Exhibit 7, Pitonyak's Deposition)**

It was discovered that Ulry approached his commercial loan officer, Larry Fraley in May, 2001 explaining that Dualtech would not meet it's obligations to National City Bank and would be shutting down. **(See Exhibit 8)** Larry Fraley, Ulry and the Vice President in charge of distressed commercial loans, Mark Nowacki, had a meeting in mid May, 2001. At this meeting, Ulry explained to Mark Nowacki that receivables are not coming in as expected and Dualtech will not be able to maintain its obligations. **(Exhibit 7)** Contrary to this, attached hereto as **(Exhibit 9)** are the bank statements of Dualtech's general fund from December, 2000 through June, 2001. Deposits generally exceeded $100,000.00 until the month of May. It was also disclosed during Nowacki's deposition recently that **DUALTECH WAS NOT BEHIND ON ANY PAYMENTS TO NATIONAL CITY BANK IN**

MAY, 2001. (Exhibit 7). In fact, Dualtech had a line of credit and a term loan from National City Bank which balance totaled approximately $350,000.00 as of November 2000. Dualtech paid a large portion of this debt owing less than $270,000.00 on both loans as of April, 2001 (a mere 5 months later) and as of November 6, 2001 the payoff amount for these loans totaled less than $160,000.00.

During the months of March and April, 2001, Dualtech paid all necessary creditors all past due amounts including the $9,300 rent payment to L&D, so that said credit with those suppliers/vendors were current upon the "closing" of Dualtech. Also, Ulry gave himself a raise from $2,000.00 to $3,000.00 per week in January 2001until May 30, 2001. **(Exhibit 10)**

On May 24, 2001 at Ulry's request, a notice was sent by Mark Nowacki to Dualtech demanding the tangible assets of Dualtech which was carbon copied to Pitonyak. **(Exhibit 11)** Immediately prior to the "shut down" of Dualtech, its staff had a meeting with Ulry and Pitonyak where Ulry and Pitonyak announced the "take over" of Dualtech by the "new" company. **(Exhibit 12)** On May 25, 2001, Stuart Gold on behalf of Ulry and Dualtech sent a letter to National City Bank surrendering Dualtech's "tangible personal property", including its accounts receivable. **(Exhibit 13).**

On May 25, 2001 Michigan Welding Specialists, Inc. (hereinafter "MWS") was incorporated and immediately started in business at the same location, with the same customers, utilizing the same telephone number, price list, address, facsimile number, equipment, inventory, materials, personnel, and the same type of welding work as Dualtech. **(Exhibit 14 and 15)** Pitonyak is the majority owner of MWS.

On or about June 8, 2001 there was correspondence and agreement between Pitonyak and Nowacki of National City Bank (hereinafter "the bank") that MSW would continue to rent the equipment of Dualtech for the sum of $3,000.00 every two weeks during the negotiations for MWS to buy the assets of Dualtech from the bank **(See Exhibit 16)**. Please note that a caveat was added to the June 8th agreement by Pitonyak that all rental payments for the equipment were to be applied as a credit to the eventual purchase of the Dualtech assets. MWS set up its bank account at Citizens State Bank on May 19, 2001 with Deborah Ulry listed as a signor and officer of MWS. **(Exhibit 17 and 38)**

Pitonyak does not receive a pay check from MWS. **(Exhibit 7, Pitonyak's Deposition)** It was also discovered that Ulry and his wife Deborah Ulry are running MWS in the same building as Dualtech during its

"winding down" and are employees/officers of MWS. **(See Exhibit 17 and Exhibit 18)** Correspondence and garnishments addressed to MWS in June 2001 were signed for by Deborah Ulry. **(Exhibit 19)**

According to Pitonyak, no payments of the $150,000.00 loan were made and Pitonyak sent Ulry a demand letter July 1, 2001**(Exhibit 20)** Contrary to this assertion attached hereto is a copy of Pitonyak's loan application to Citizens State Bank, where Pitonyak states that Ulry is paying Pitonyak's home equity loan as of June 18, 2001. **(Exhibit 21)**

On or about August 10, 2001 August F. Pitonyak purchased computer equipment of Dualtech from Lakeside Community Bank without notice to Starks. **(See Exhibit 22)**.

According to Deborah Ulry any and all checks and/or payments coming into 31125 Fraser Drive, Fraser, Michigan (MWS's location) were opened by her and forwarded to the bank to be applied to the outstanding obligations of Dualtech. Also, Deborah Ulry and Pitonyak testified that she was still receiving the rental payments of 72 Rathbone and putting same in a box at home as opposed to giving it to Pitonyak over 6 weeks after Pitonyak had "foreclosed" on the loan. **(See Exhibit 23)** Neither Pitonyak nor Deborah Ulry could explain why Deborah Ulry was still collecting the rent and paying the mortgage payments of a house that she and her husband no longer owned. Pitonyak also did not file the deed that he had in his possession transferring title of 72 Rathbone to himself, until January, 2002, when a title search conducted by Starks was sent to council for Pitonyak showing the house was still in Ulry's name. **(Exhibit 24)**

During July and October, 2001 Mark Nowacki sent correspondence to Pitonyak for Citizens Bank (Pitonyak's bank) for the payoff amounts of all Dualtech obligations. **(See Exhibit 25)** It is also interesting to note that Dualtech loans were personally guaranteed by L&D. As a guarantor of L&D obligations, Pitonyak was then effectively the guarantor of Dualtech obligations. On November 6, 2001, over the objections of Starks, National City sold to MWS and Pitonyak all assets of Dualtech for the sum of $158,000.00 ($188,000.00 – $30,000.00 credit for lease payments). This happens to be the exact amount of the obligation's (with interest) that Dualtech owed to National City Bank. Thus, no proceeds remain for any other creditors, such as Starks. At this point, it appears that all other creditors of Dualtech have been satisfied, beside Starks.

In May of 2002, Ulry and his wife filed for bankruptcy. Both Ulry and Deborah Ulry still work at MWS.

A. THE COURT ERRED IN GRANTING DEFENDANTS MOTION FOR RECONSIDERATION OF DEFENDANT'S MOTION FOR CLARIFICATION

1. Improper procedure.

Pursuant to MCR 2.119 (F) (1) Motions for Reconsideration, "must be served and filed not later then 14 days after entry of an Order disposing of the motion." Obviously a motion which requests the Court to reexamine its Order of July 2, 2003 must be filed and served by July 16, 2003. In this case, the Motion for Clarification was filed by Defendants/Appellee February 20, 2004. In actuality, the Defendant's Motion for Clarification was a motion for complete reconsideration and cannot be disguised by semantics. Same was acknowledged by the Trial Court in its Opinion and Order of May 13, 2004 where the Court states, "claims survived the Courts scrutiny once more when readdressed in the Opinion and Order dated April 22, 2004."(emphasis added) **(Exhibit 26, 5-13-04 op. and ord.)**

Once the Court denied Defendant's Motion for Clarification in its Opinion and Order dated April 22, 2004, the Defendants/Appellee then filed a Motion for Reconsideration which was granted seven days later. The Motion for Reconsideration filed by the Defendant/Appellee should not have been entertained as the underlying motion for clarification was procedurally defective. Therefore, due to these procedural defects, the Trial Court should have denied a hearing of the Motion for Clarification and subsequent Motion for Reconsideration or in the alternative granted Plaintiff's/Appellant's Motion for Reconsideration of the May 13, 2004 Opinion and vacated same.

2. The Trial Court conducted fact finding in its Opinion and Orders.

The standard of review is clearly delineated in the Trial Court's Opinion and Order of July 2, 2003 **(Exhibit 27)** stating,

> A motion brought under 2.116 (C) (10) tests whether there is factual support for Plaintiffs claim. The motion may be granted only if there is no issue of material fact and the moving party is entitled to a judgment as the matter of law. Upon review, this Court considers the pleadings, depositions, affidavits, admissions and any other documentary evidence in a light most favorable to the non-moving party. Citing Lett v. Cheboygan Area Schools, 190 Mich App 726; 476 NW2d 506 (1991).

Considering the above standard, the Court should not weigh creditability of Affidavits which are submitted by the parties particularly if motive or intent is at issue or if the testimony of a deponent or witness is crucial.

Vanguard Insurance Company v. Bolt 204 Mich App 271 514 NW2d 525 (1994). The Court must carefully avoid substituting a trial by Affidavit and deposition for a trial by jury. The Court is not allowed to make findings of fact or weigh the credibility of Affidavits or deponents. Soderberg v. Detroit Bank & Trust Co. 126 Mich App 474; 337 NW2d 364 (1983).

In this case, the Court states in its Opinion and Order, "the evidence shows that MWS merely purchased its assets from a disinterested party and established its own company, and held itself as a new company." **(Exhibit 24, pg. 4)**

In fact, the Court makes a mistake in its fact finding where it indicates that "it is undisputed that National City Bank issued a demanding letter for the surrender of its assets, and that Dualtech complied". (emphasis added) **(Exhibit 27 pg. 12)** The importance of this factual determination is also evident in the Courts Opinion and Order of July 2, 2003 where it states, "Germane to the current analysis is the undisputed fact that Dualtech surrendered the property to a secured creditor, the bank, who then in return sold the property to MWS." (emphasis added) **(Exhibit 27 pg. 12)**

Throughout the pleadings in this case, it has been the position of the Plaintiff/Appellant that Dualtech did not surrender all of its assets. In addition, the letters and documentation indicate that the surrender was only for "tangible assets" and the response letter from Dualtech only indicates the equipment and accounts receivable as being surrendered. **(Exhibit 13 and 11)** Therefore, it was improper for the Court to factually determine that Dualtech had complied with a request from the bank to surrender its assets when it did not.

In this particular case, a jury demand was filed and anticipated to determine the facts relevant to this case. Unfortunately, the Trial Court has taken it upon itself to render these factual determinations during the Motion for Summary Disposition and Motion for Clarification.

It is Plaintiffs/Appellants position that the good will, which includes the customer list, vendor I.D number, fax number, telephone number etc. were directly transferred to August F. Pitonyak and MWS by Deborah Ulry, Ulry and Dualtech. It is admitted by Pitonyak that no money was ever paid for same. **(Exhibit 28).** In addition, the inventory of Dualtech was never accounted for, given to the bank, or otherwise secured by the bank. This goodwill was valued by an expert at $696,200.00 in May of 2001 has never been listed or accounted.**(Exhibit 30)** It is evident from the facts stated previously that MWS simply took the work, materials and supplies of Dualtech and

used them to generate a profit for itself during the first three weeks of operation where Pitonyak and MWS did not show any evidence of payment to any vendors or suppliers for same for over a month from its inception.**(Exhibit 29)** MWS had no customers of its own as it did not exist prior to May 25, 2001. **(Exhibit 14)**

Fact finding by the Trial Court is also evident where the Trial Court disregards Plaintiff/Appellants documents showing both of the Ulry's as officers of MWS, stating "MWS has produced a letter from the bank demonstrating that Ulry's involvement was due to a quirk in the software." **(Exhibit 26 pg 3)**.

Although the Trial Court may find the letter of explanation by Pitonyak's loan officer sufficient, a jury may determine that the loan officer is merely satisfying its customer's request. In particular, the jury may surmise, the bank would be especially accommodating where the loans of Pitonyak with Citizens bank are in excess of $600,000.00.

Considering the above, it was both improper and inaccurate for the Trial Court to render its fact finding decisions as part of its analysis regarding the Motion for Summary Disposition resulting in the Opinion and Order of July 2, 2003 as well as its Opinion and Order of May 13, 2004 granting Defendants/Appellees Motion for Reconsideration of its Motion for Clarification. As such, both orders should be vacated.

B. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CLAIM FOR STATUTORY CONVERSION.

Plaintiff's Complaint Count II alleges Pitonyak conspired to convert assets of Dualtech to MWS in violation of MCL 600.2919 (a). The Trial Court in its July 2, 2003 Opinion and Order dismissed this claim stating, "the court is not persuaded that Plaintiff has presented evidence sufficient to create a question of fact that the transfer of assets from National City Bank to MWS was fraudulent." **(Exhibit 27)**

Once again, it is not only the equipment that was purchased by MWS from National City Bank which is at issue under this claim. Obviously, it is the **valuable goodwill** reiterated throughout this brief which was given to Pitonyak and MWS which is part of the fraudulent conveyance violation. The goodwill has been valued at $696,200.00 by Plaintiff's expert at about the same time MWS took over. **(Exhibit 30)**

MCL 600.2919 (a) provides that a person who is damaged as a result of another person aiding in the concealment of any stolen, embezzled property may be held liable for same. Conversion is defined as an

unauthorized and wrongful exercise of dominion and control over another's personal property. Attorney General v. Hermes 127 Mich App 777,339 NW2d 545 (1983), App. Den. 419 Mich 853 (1984)

In this case, Pitonyak and MWS took possession and/or control over property belonging to Dualtech which would have been available for execution by the right vested in the settlement agreement/security agreement and the UCC-1 lien filed by Starks. **(Exhibit 1 and 2).** The banks own appraisal shows the liquidation value of the equipment at $352,650.00 **(Exhibit 31).**

Pursuant to MCL 566.31 (j) property means anything that may be the subject of ownership. In addition, intangible rights have been acknowledged under the doctrine of conversion by the Michigan Court of Appeals. In Sarver v. Detroit Edison, 225 Mich App 580 (1997) the Michigan Appellate Court acknowledged that it has held certain intangible property can be the subject of a conversion action. Citing Warren Tool Co. v. Stephenson 11 Mich App 274, 276; 161 NW2d 133 Tuuk v. Andersen, 21 Mich App 1, 13; 175 NW2d 322 (1969) Miracle Co, LTD. v. Platray Corp. 57 Mich App 443, 451; 225 NW2d 800 (1975).

Goodwill has been defined as "Property of an intangible nature." Blacks Law Dictionary 6th Edition. Citing In Re Marriage of Lukens, 16 Wash App, 481, 588 P.2d 279.

Here, Starks had a vested security lien interest as represented by the Settlement Agreement and UCC-1 lien which has lost its value due to the wrongful removal of the underlying asset to which it applies. Under MCL 440.9604, 440.9607, 440.9609, Starks was entitled to proceed to possess all property of Dualtech and dispose of same, but was prevented from doing so by the shield and transfer of the assets, including goodwill by MWS as aided Pitonyak and Ulry. Pursuant to the settlement agreement, Ulry on behalf of Dualtech pledged all of its assets as security for the payment of the obligation owed to Starks. As such, Starks had a protected property interest in the goodwill and other intangibles as well as the equipment of Dualtech which has been sold for below its fair market value and simply given to Pitonyak and MWS. As such, the trial court committed clear error in granting Defendant's Motion for Summary Disposition as to the fraudulent conveyance claims made by Starks against Pitonyak and MWS.

The Trial Court indicates in its Opinion and Order **(Exhibit 26)** that Plaintiff did not bring claims against the bank, however this is immaterial to the analysis under the law. The Trial Court's requirement that the bank must be included in Plaintiff's claims is akin to finding a bank robber not guilty simply because the driver of the get

away car was never charged. There is no rule or law requiring all conspirators to be made part of the claim or suit in order to prevail against the wrong doer. As such, the trial courts analysis is flawed and its orders of July 2, 2004 and May 13, 2004, should be reversed.

C. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AS TO PLAINTIFF'S FRAUDULENT CONVEYANCE CLAIM

Plaintiff' Complaint Count IV is titled, "Fraudulent Conveyance". The Count alleges that certain assets of Dualtech were transferred to MWS and/or Pitonyak without adequate consideration for same and that said transfers were in violation of MCL 566.34, 566.34 (1) (b), 566.35 (1) and 566.35 (2). In the Trial Courts opinion and order dated July 2, 2003 it dismissed same summarily. **(Exhibit 27)**

The facts show a violation of MCL 566. 34 (1) (b) (i) (2). As the conveyance occurred with the intent to defraud Starks of his judgment against Ulry and Dualtech. When Pitonyak "loaned" Ulry $150,000.00, Pitonyak knew that there was already a $435,000.00 Judgment against Ulry and Dualtech **(Exhibit 7)**, Ulry's remaining assets were neither known by both Pitonyak and Ulry to be unreasonably small in relation to the business transaction. In addition, Pitonyak testified that L&D Renaissance Properties "loaned" $100,000.00 to Dualtech. **(Exhibit 7)** Pitonyak knew that there was a Judgment against Dualtech for the same $435,000.00 and the remaining assets of Dualtech were unreasonably small in relation to the $100,000.00 loan L&D was making to Dualtech. It is also obvious that these debts were going to be beyond Dualtech's and Ulry's ability to pay which is a violation of, MCL 566.32 (1) and (2) within five months of said loan.

Plaintiff's claims also apply under MCL 566.35, "Transfer by Debtor as Fraud." It states in relevant part, under subsection 1 that a party cannot transfer or incur an obligation without receiving a reasonably equivalent value for the transfer obligation. In this case, obviously receiving the goodwill of a company without paying any money is not a reasonably equivalent value. In addition, subsection 2 does not allow a transfer where same was made to an insider for an "antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent." Obviously, if Pitonyak knew that Dualtech was out of business, any transfers of assets, including the goodwill and inventory of Dualtech to himself or MWS violates this section of MCL 566.35. In addition, loaning $250,000.00 to Dualtech and Ulry to gain a security interest in their assets when Pitonyak knew there was

already a $435,000.00 Judgment against them is also a violation of this act. Both Ulry and Dualtech are presumed insolvent under MCL 566.32 (1) and (2) due to both failing to pay their bills and their assets being insufficient.

MCL 566.34 (2) lists the factors to be considered by the Trial Court in determining the Defendant's intent to defraud Plaintiff. Although only 1 or 2 factors in Plaintiff's favor are necessary, nearly all of the factors show the intent of Pitonyak and Ulry to defraud Starks.

(a) The transfer or obligation was to an insider. Ulry and Pitonyak were longtime friends and business partners in L&D Renaissance Property, L&D is the owner of the building where Dualtech is the sole tenant.

(b) The debtor retained possession or control of the property after the transfer. The Ulrys still collected rent from 72 Rathbone as well as have possession of all Dualtech's assets. The bank never took possession or rendered the equipment unusable. **(Exhibit 16)**

(c) The transfer or obligation was concealed. All of the notices sent out to creditors and customers of Dualtech, does not mention anything other than negotiations and the use of the equipment of Dualtech. Thus, the goodwill and inventory are not disclosed as transferred. The $250,000.00 in loans ($100,000.00 to Dualtech and $150,000.00 to Ulry) and the acquiring of 100% of L&D and 72 Rathbone was not disclosed until the depositions in August, 2001.

(d) Before the transfer was made or obligation was incurred, the debtor has been sued or threatened with suit. Obviously, transfers of money in December, 2000 between Pitonyak, Ulry and Dualtech occurred during the same month that Ulry entered into a settlement agreement with Starks. **(Exhibit 1)**

(e) The transfer was of substantially all of the debtor's assets. MWS and Pitonyak have all of Dualtech's assets, including accounts receivable and goodwill, as well as Ulry's non-secured assets.

(f) The debtor absconded. Instead of leaving town, Ulry simply got a job at MWS within a week after his creditor's examination was taken by Plaintiff's counsel and 6 weeks after Dualtech handed everything over to MWS. Both Ulrys declared Chapter 7 Bankruptcy and are now protected under the bankruptcy laws, and Dualtech allegedly disappeared.

(g) The debtor removed or concealed assets. There is still no accounting for all of the money allegedly loaned to Ulry and/or Dualtech. Thus, the Ulrys are hiding assets behind the cloak of MWS and Pitonyak.

(h) The value of the consideration received by the debtor was not reasonably equivalent of the amount of the obligation incurred. It is interesting to note that Pitonyak purchased one-half of L&D for $150,000.00. However, in his loan to Ulry he took as security the other 50% of the same building (L&D) as well as an additional $75,000.00

asset known as 72 Rathbone where he has decided to allow the Ulry's to continue receiving the rent. Therefore, the loans between Pitonyak and Ulry's were over-collateralized and not reasonably equivalent of the amount of the obligation incurred. Also, Dualtech handed over inventory, customer lists, the Vendor I.D. number, the telephone and fax number of Dualtech to MWS to be outside the reach of the secured creditor for free.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred. Obviously with a large outstanding Judgment held by Starks against Ulry and Dualtech, Dualtech's alleged closing and both Ulry's bankruptcies shows the debtors insolvency.

(j) The transfer occurred shortly after a substantial debt was incurred. Obviously, the Judgment was entered October 31, 2000 against Dualtech and Ulry. The parties negotiated and finally entered nto a settlement in December, 2000 for which payment was to be received by January, 2001. At almost the identical time, Pitonyak was loaning to Dualtech and Ulry $250,000.00.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. This is exactly what the Appellee/Defendant alleged happened to the equipment of Dualtech. Appellee/Defendant claims that Dualtech gave assets to a lienor (National City Bank) who then transferred assets to the business partner of Ulry and the landlord, as well as guarantor of Dualtech, August F. Pitonyak. Appellant/Plaintiff claims the goodwill was merely transferred directly from the debtors, Dualtech and Ulry to Pitonyak and MWS for free.

Therefore, it is clear that Defendant's MWS and Pitonyak engaged in a fraudulent conveyance as supported by competent evidence. MCL 566.37 allows the Court various means of granting relief to Starks from setting aside transfers, appointment of a receiver to take charge of the assets, attachment of the assets for the benefit of the creditor or, "any other relief the Court deems appropriate" MCL 566.37 (1) (c) (iii).

In addition MCL 566.38 (2) (a) allows the Court to enter judgment against the first transferee of the asset and under MCL 566.38 (3) the judgment may be based upon the value of the asset transferred.

In this case, the value of the good will received directly by MWS from Dualtech is valued at $696,200.00 as of May 31, 2001 based upon the expert report of Phillip Gaglio of the Leftko Group. **(Exhibit 30)** In addition, Pitonyak applied for a loan which application is dated April 1, 2002 indicating his 80% ownership of MWS equipment and good will to be valued at $300,000.00.**(Exhibit 34)** Utilizing simple mathematics this generates a total value of the good will and equipment of MWS to be $375,000.00. As there were no additions to the equipment

of MWS prior to April 1, 2002 one may simply deduct the $188,000.00 paid for the equipment, leaving a balance of $187,000.00 which must be the value of the goodwill in Pitonyak's estimation (if not more, considering the depreciation of the equipment). Therefore, at the very least, the order of July 12, 2003 should be reversed and Charles Starks is entitled to a judgment based on the fraudulent conveyance of the good will for no value or money in the amount of $187,000.00 against MWS. The Trial Court and Court of Appeals has not understood that the goodwill was transferred before the sale of National City to MWS. Since National City never secured the assets of Dualtech, the transfer of goodwill was directly between Dualtech and MWS, National City was not involved. The lease was for "tangible assets" only.

D. THE TRIAL COURT ERRED IN DISMISSING CLAIMS AGAINST PITONYAK INDIVIDUALLY UNDER A THEORY OF PIERCING THE CORPORATE VEIL.

In this case, the issue of piercing the corporate veil is contingent upon the Court finding that there is evidence showing Pitonyak engaged in some type of wrongful conduct or misuse of the corporate veil to protect himself individually from liability. Pitonyak's assistance in converting property from Dualtech directly for the benefit of MWS as well as his assurances to employees of Dualtech that he was taking over the business was done in order to elude the judgment and secured liens of Starks. All of these actions evidence wrong doings of Pitonyak and the abuse of the corporate veil by him. As such, it is reasonable for a fact finder to determine that the corporate veil of MWS should be pierced and Pitonyak should be held personally liable for the debt, Department of Consumer Industry Services v. Shah, 236 Mich App 381, 393; 600 NW2d 406 (1999).

In the case of Foodland Distributors v. Al-Naimi, 220 Mich App. 453 (1996) The Michigan Court of Appeals allowed piercing of the corporate veil and awarded the Plaintiff a judgment against the individual corporate officers of the Defendant corporation due to the fraud and fraudulent conveyances engaged in by those individual Defendants. The standard enunciated in Foodland Distributors or piercing of the corporate veil is:

- First, the corporate entity must be a mere instrumentality of another entity or individual.
- Second, the corporate entity must be used to commit a fraud or wrong.
- Third, there must have been an unjust loss or injury to the Plaintiff. Citing, SCD Chemical Distributors, Inc. v. Medley, 203 Mich App. 374, 381; 512 NW2d 86 (1994).

Pitonyak claims to be the President and 80% owner of Michigan Welding Specialists. It was alleged that Doug Caudell, a former employee of Dualtech was the other 20% owner. However, upon deposition of Doug

Caudell it was discovered that he has no documentation evidencing any such arrangement. Caudell confirmed that he had no written agreement, corporate papers, stock certificates or other documentation evidencing any 20% ownership of Michigan Welding, but it was "understood". **(Exhibit 32)** Therefore, MWS did not act as a corporation by holding meetings, issuing stock certificates and keeping minutes or paying its majority shareholder, but was formed to shield the fraud of Pitonyak. Nonetheless, the whole scheme described above would have been impossible without the aid and assistance of Pitonyak.

Pitonyak clearly stated in this deposition that he was aware in December, 2000 when he "loaned" $150,000.00 that there was currently a judgment in favor of Starks against Ulry and Dualtech in the amount of $435,000.00. Pitonyak's cooperation was a necessary element of the scheme, which has personally benefited Pitonyak in the form of profits received from MWS as well as rental payments to L&D. This windfall to Pitonyak personally cannot be ignored and he is just as liable as MWS under the Michigan fraudulent conveyances act and cases cited within this brief. The $150,000.00 "personal loan" to Ulry is not reflected on Ulry's loan application of March 7, 2001 **(See Exhibit 33)** although the loan allegedly took place December 28, 2000. In addition, attached hereto as **(Exhibit 21)** is the loan application of Pitonyak where Pitonyak states Larry Ulry is paying this note. Pitonyak did not "default" Ulry on the loan until July 1, 2001, although Ulry never paid the first payment March 1, 2001. Pitonyak has ended up with a building worth at least $640,000.00, a business worth $900,000.00 and a house valued at $75,000.00- for his $300,000.00 investment.

Considering this evidence of wrongdoing by Pitonyak, the jury could have found that piercing the corporate veil is warranted. As such, the order of May 13, 2004 should be vacated.

E. THE TRIAL COURT ERRED BY NOT GRANTING PLAINTIFF'S COUNTER MOTION FOR PARTIAL SUMMARY DISPOSITION AS TO SUCCESSOR LIABILITY OF MICHIGAN WELDING SPECIALISTS

Appellant/Plaintiff's counter-motion for Summary Disposition was brought pursuant to MCR 2.116 (C) (9) and (10). MCR 2.116 (C)(9) tests the legal sufficiency of the defense. Such a motion is tested by reference to the pleadings alone, with all well-pleaded allegations accepted as true. The proper test is whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recovery. Nicita v City of Detroit, 216 Mich App 746, 750, 550 NW2d 269 (1996).

Under the traditional rule of Successor Liability, if acquisition is accomplished with shares of stock serving as consideration, the successor generally assumes all of the predecessors' liability; however, where the purchase is accomplished by an exchange of cash for assets, the successor is liable for the predecessors' liability if **one** of the following occurs:

1. There is an expressed or implied assumption of liability.
2. The transaction amounts to a consolidation or merger.
3. The transaction was fraudulent.
4. Some elements of a purchase in good faith were lacking or the transfer was without consideration and creditors were not provided for; or
5. The transfer was a mere continuation or reincarnation of the old corporation.

Foster v. Cone-Blanchard Mach. Co., 597 NW2d 506 460 Mich 696, rehearing denied 602 NW2d 576, 461 Mich 1205 (1999).

In this case, the transaction amounts to a consolidation or merger, the transaction was fraudulent, the transaction was not in good faith (without consideration) and the transaction was a mere continuation or reincarnation of the old corporation.

1. The transaction amounted to a consolidation or merger.

Plaintiff/Appellant argued in his Motion for Summary Disposition that there was a defacto merger between MWS and Dualtech with all of the following elements established:

> (1) There is a continuation of the Seller Corporation, so that there is a continuity of management, personnel, physical location, assets, general business operations of the predecessor corporation;
> (2) The predecessor corporation ceases its ordinary business operations, liquidates and dissolves as soon as legally and practically possible;
> (3) the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the selling corporation. Foster, Supra

In this case, MWS has employed the same employees as Dualtech including both of the Ulry's in their former positions, evidence shows that both Ulrys are indicated as officers of the corporation (although attempted to be explained away by the Defendant/Appellee in their response to Plaintiff's counter motion). **(Exhibit 17 and 18)**

MWS uses the same telephone number, fax number, address, equipment, customer list, Chrysler Vendor I.D. number, etc. as Dualtech. **(Exhibit 7, 12, 28)**

On May 25, 2001, Dualtech claimed to cease its ordinary business operation and liquidate paying to National City Bank all proceeds received from their accounts receivables. This could have only been done if anticipated by Ulry and Dualtech. On the very same day, MWS began operation utilizing the inventory, equipment, personnel, customer list, fax number, and the telephone number of Dualtech. **(Exhibit 29, 14, 15)**

As to the third factor, MWS assumed the liability of Dualtech only as to essential creditors for its continuation. Pitonyak has testified that he paid on behalf of MWS an electric bill of Dualtech. **(Exhibit 7)** In addition, MWS continued to pay Blue Cross Blue Shield to continue to the health care policy of the employees of Dualtech and Workers Compensation Insurance for almost over a year after MWS took over **(Exhibit 35 and 36)**. Dualtech made sure it did not owe any of its essential supplier's money at the time it closed so that MWS could continue to utilize same. This activity of paying bills of Dualtech ensured MWS would continue uninterrupted in the normal business operations of Dualtech. It was not until nearly a month after it was incorporated that MWS sent notices to customers of Dualtech that it was going to provide the same service with the same people that customers have been accustomed to. **(Exhibit 15)**

An additional principle relevant to determining successor liability is whether the purchasing corporation holds itself out to the world as the effective continuation of the seller corporation. Foster, Supra at 704. Not only did MWS make contact by sending notices to **all** of the customers of Dualtech, Pitonyak testified that he simply called up Daimler Chrysler and had the Vendor Number changed to reflect MWS would now be utilizing said Vendor I.D. number which was previously by Dualtech, instead of applying for a new Vendor I.D number.**(Exhibit 7)** Thus, there would be no interruption of work from Dualtech's #1 customer.

Also, correspondence from MWS to its liability insurance company and its Workers Compensation insurance carrier indicates that it is one and the same corporation as Dualtech **(Exhibit 36 and 37)**. Obviously, if MWS was completely separate and distinct from Dualtech as well as a brand new company, it would have acquired its own Chrysler Vendor I.D. number, its own Blue Cross Blue Shield policy, its own Workers Compensation policy, its own customers, its own material and inventory.

What the evidence shows is that the Dualtech sign on the front of the building was taken down and MWS took over. It is interesting to note that MWS was not even funded until June 19, 2001.**(Exhibit 38-bank records)** Therefore, for nearly three weeks the company operated without any funds customers or material at all How is this possible? Because MWS merely continued the work already in the shop provided by Dualtech as well as the employees, inventory and supplies provided by Dualtech. MWS did not even have to buy toilet paper to begin its business. Please note that no secured creditor was paid any funds from MWS during this three week initial start up period. In addition, the employees were insured of their jobs by a meeting held by Ulry, Pitonyak and the staff indicating that Pitonyak was taking over the business. **(Exhibit 12).** Therefore, the world and even its employees were told that MWS is simply Dualtech renamed.

2. **The transaction was fraudulent.** MWS did not give any consideration for the goodwill of Dualtech and thus violated the fraudulent conveyance statute, **MCL 566.34 and 566.35**. Michigan Courts have found that goodwill can constitute an asset. SCD Chemical Distributors, Inc. v. Medley, 203 Mich App 374, 379;512 NW2d 86 (1994). In the case of G.C. Timmis & Company v. Guardian Alarm Company, 468 Mich 416; 662 NW2d 710 (2003), the Michigan Supreme Court discusses the definition of "goodwill". The Timmis case involves an investment advisor who sought collection of his fee but was prohibited from collecting same pursuant to the analysis of the Michigan Court of Appeals on the ground that the advisor acted as a unlicensed real estate broker. Id. Although the final decision of the Timmis case is not material to the case at bar, the analyses regarding goodwill is relevant. The majority opinion states that real estate of the premises in which the business is conducted is one way to acquire goodwill. Id. at page 424,f. n. 8 citing Blacks Law Dictionary (6th edition). The dissenting opinion notes, goodwill is an intangible asset defined as "the favor which the management of a business wins from the public" and "the fixed and favorable consideration of customers arising from established and well conducted business". Citing Black Law Dictionary 5th Edition, Id. at page 438.

The dissenting opinion continues by stating the majority makes a conscience effort to ignore that the fact "goodwill" is a legal term of art and it is distinct from real estate or any other physical asset. Id. 439. The dissenting opinion also cited Random House Webster's College Dictionary (2002), which defines goodwill as "an intangible saleable asset arising from the reputation of a business and its relations with its customers." Id. at 427 fn2.

In fn3 of the Timmons case, the dissenting opinion quotes the definition of goodwill found in Blacks Law Dictionary stating,

> The custom of patronage of any established trade or business; the benefit or advantage of having established a business and secured its patronage by the pubic. And as property incident to the business sold, favor vendor has won from public and probability that all customers will continue that patronage. It means that every positive advantage that has been acquired by a proprietor incurring on his business, whether connected with the premises in which the business is conducted, or the name under which is it managed, or with any other matter carrying with it the benefit of the business. Id.

Customer lists are an essential part of the goodwill of a company as evidenced in the case of Campbell-Bruce Oil Company v. Green 42 Mich App 161; 201 NW2d 362 (1972). In Campbell Bruce, the Michigan Court of Appeals decided that a client list of an employee of Standard Oil Company was the property of Standard Oil Company not the employee whose subsequently transferred same to the Plaintiff. As that Court noted,

> "Defendant formerly was an employee of the Standard Oil Company where he services customers of that company, and in rendering said service, he compiled a list of the clientele which he purported to sell to Plaintiff these customers belong to Standard Oil and not to the Defendant..... if there was any goodwill under these circumstances, it belonged to Standard Oil Company and not to the Defendant. Id. pages 163-164.

Similarly in this case, the goodwill of Dualtech has been in existence since 1984 when the company was under the name of the Accurate Welding II, Inc. Attached hereto as **(Exhibit 30)** is the expert opinion and report of the Leftko Group by Phillip Gaglio stating the goodwill value of Dualtech was $696,200.00 as of May 31, 2001 (within a week of the alleged closing of Dualtech). This goodwill value has been received by MWS for free. It was direct transfer from Dualtech to MWS as the bank never took possession of the intangible assets nor did they receive rent for same. Essential supplies for Dualtech such as paper, ink, gas, welding rods as well as the toilet paper was simply handed over to MWS from Dualtech without intervention of the bank or payment for same by MWS.

Even though Appellee/Defendant has argued to the lower court that it eventually paid for same claiming the purchase agreement evidences a transfer of general intangibles, it is contradicted by the answers to interrogatories and deposition of Pitonyak indicating that he did not pay for the telephone number, fax number, customer lists or vendor I.D. number of Dualtech.**(Exhibit 28)** Each of these things constitutes part of the goodwill and is directly contrary to any claim that it was eventually purchased. As shown in the attached documentation, the purchase price

was simply the amount owed by Dualtech to National City Bank. National City Bank specifically excluded items which Lakeside Community Bank had a superior lien. **(Exhibit 8)** It is impossible to fathom how the bank could have prevented Pitonyak from absconding with the goodwill and inventory if the bank had not been paid for the equipment since Pitonyak had possession of same months prior to the sale. During the deposition of Mark Nowacki from National City Bank, it was disclosed that he utilized the formula of how expensive it would be to move the equipment and to procure other offers from other interested persons to buy the equipment. Mark Nowacki did not testify that he considered the purchase to contain the intangible assets of Dualtech as well. **(Exhibit 8).**

Finally, it is evident that MWS is a continuation of Dualtech as Deborah Ulry continued to handle the mail of MWS, writing checks, handling the insurance and bookkeeping, just as she had for Dualtech before she was even hired to do same. **(Exhibit 17, 19)** Deborah Ulry is listed as an officer and signer of a bank account for MWS weeks before she was on the payroll records. **(Exhibit 17)** Also, the Blue Cross Blue Shield Health Insurance Policies of the Ulry's continued during the six week time period between when Dualtech closed and MWS placed the Ulry's on the payroll (July 9, 2001). **(Exhibit 29, 35)** Dualtech and MWS have even continued to pay for the daughter of the Ulry's to attend Baker College just as Dualtech had, although she was not working for either Dualtech or MWS at the time of payment. **(Exhibit 10, 29)**

Given all of the above, the trial court and the Court of Appeals erred in not holding that either a defacto merger existed between MWS and Dualtech such that MWS was liable as a successor to Dualtech for its outstanding obligation to Starks or in the alternative that the conveyance was fraudulent as to certain assets thereby also creating successor liability for MWS for the debts owed by Dualtech to Starks. Thus, the orders of May 13, 2004 and July 2, 2003 should be reversed.

F. THE COURT ERRED IN DISMISSING PLAINTIFF'S CLAIM FOR A CONSTRUCTIVE TRUST

A constructive trust is an equitable remedy which a Court may impose where justified by the facts, even in the absence of a request for such relief from the Petitioner. In Re: Swantek Estate 172 Mich App 509 517; 432 NW2d 307 (1988). The Michigan Court of Appeals has defined a constructive trust as a creature of equity and its imposition makes the holders of the legal title the trustee for the benefit of another who in good conscience is entitled to the beneficial interest. They are distinguished from express and resulting trusts in that they do not arise by agreement or intention, but way of operation of law. Id.

A constructive trust is an appropriate remedy to prevent unjust enrichment to the holder of goods. Kammer Asphalt Paving Co. v. East China Township Schools, 443 Mich 176, 188; 504 NW2d 635 (1993). In addition, under a constructive trust, equity can follow the assets upon which the trust is based into whatever form they may be converted. Swantek, Supra, 517-518.

In this case, there have been ample facts delineated above and presented to the Trial Court that shows Pitonyak and MWS have been unjustly enriched by taking assets of Dualtech directly without payment of same (goodwill-customer list, inventory, telephone number, fax number, Chrysler vendor I.D number, etc.)

In Appellee/Defendant's motion for clarification (and reconsideration), the Appellee/Defendant argued that it did pay for said goodwill at the closing with National City Bank in November, 2001 according to the sale documents. This argument obviously flies in the face of the admission of the Defendant, August Pitonyak indicating that he did not pay for same **(Exhibit 28)** and the evidence contained in the letter showing the lease of equipment only by MWS.**(Exhibit 11)** The Defendants argument is also controverted by Stuart Gold's letter indicating that Dualtech was only surrendering its tangible assets and accounts receivable. **(Exhibit 13)** Obviously, Dualtech never surrendered its intangible assets which includes the goodwill. It is important to note that Dualtech did transfer same to MWS before the bank even had a lease agreement with MWS for the equipment. Therefore MWS had the intangibles at least 5 months prior to the alleged sale. There is no way such information could have been "recaptured" by the bank since the customers of Dualtech had already moved to MWS.

As such, if the jury/fact finder believes that Pitonyak and MWS were unjustly enriched by the fraudulent conveyance and the conspiracy of conversion, as well as deem same to be unconscionable behavior, a constructive trust may be imposed over all of the purchased assets, A judgment for the profit during the time period before the purchase agreement or at least the value of the goodwill may also be appropriate remedies.

The trial court erred in determining that a constructive trust could not be imposed upon the assets or profit therefrom simply due to its determination that the Appellant/Plaintiff did not adequately respond to Defendants argument that a constructive trust was inappropriate. In Plaintiff's Brief and Support of Plaintiff's Response to Defendant's Motion for Summary Disposition and Brief in Support of Plaintiff's Counter Motion for Summary Disposition, Appellant/Plaintiff elaborates on its position and the wrong doings by the Defendant throughout. As such, rather than repeat the same argument in its reply brief, Plaintiff/Appellant referred the Court to the allegations

and evidence showing the wrong doing and the benefit received by Pitonyak and MWS. The Plaintiffs intention that a constructive trust should be imposed was one of many remedies available to the Trial Court. For these reasons, Appellant/Plaintiff requests this Court vacate the Trial Courts' opinion and order dated July 2, 2003 reinstating Plaintiff's/Appellants Count IV; Constructive Trust.

CONCLUSION

In this case, it is undisputed that there was a direct transfer between Dualtech and MWS by way of Pitonyak and Ulry simply taking the goodwill and inventory. There is ample evidence showing that MWS is the mere continuation or alter ego of Dualtech, Inc. There is also evidence that Ulry and Pitonyak conspired together in order to defraud Starks of his judgment and lien against Dualtech and Ulry.

This is the same activity Ulry has been known to have attempted before. It was determined at arbitration that Ulry had taken Accurate Welding II, Inc. and simply changed the sign and took one of its key employees, David DeCook as his partner. After Starks had shown fraud in that activity, Ulry has attempted to do the same thing again by replacing DeCook with his business partner, August Pitonyak.

By utilizing the bank as the "front man" Ulry and Pitonyak have attempted to defraud Starks by confusing the transaction as well as attempting to create an illusion that a new company has started in place of the old and entered into an arms length transaction with National City Bank. However, Pitonyak had a interest to protect in Dualtech as he would have been personally liable for the debts of same owed to National City Bank had he not engaged in this transaction. There are many obvious factors in this transaction indicting it is a scam, such as continuing to use the same Workers Compensation insurance policy, continuing to use the same health care insurance company, claiming to be the same company "formerly known as" Dualtech, Pitonyak's access to the books and records of Dualtech as well as the use of the inventory for free, paying for the health care insurance of two individuals (the Ulry's) who are not even employees of the company, paying for the schooling at Baker College for Tasha, (the Ulry's daughter) during the time she was not employed at MWS as well as the company not being funded for its first three weeks of operation. This clearly shows that this company whose goodwill was valued to over $600,000.00 at the time of closing was simply re-named as Ulry and Pitonyak play games with the law.

A fact finder after hearing all of the above facts will easily determine that Ulry and Pitonyak worked together to wrongfully transfer assets for below market value or for free, from Dualtech to MWS and that it is one and the same company.

WHEREFORE, the Appellant/Plaintiff requests this Honorable Court grant its application for leave to appeal or Court of Appeals dated November 29, 2005 and reverse the Orders of the Trial Court dated July 2, 2003, May 13, 2004, and June 7, 2004, reinstating Plaintiff's Complaint and, award Appellant a judgment against the Appellees in whatever amount this Court deems just.

Respectfully Submitted,

JOHN R. TATONE & ASSOCIATES, P.LC.

BY: JOHN R. TATONE P55825
Attorney for Plaintiff
33830 Harper Avenue
Clinton Township, Michigan 48035
(586) 415-1200
Fax: (586) 415-1210